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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-917

RAY J. BERAN,
Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

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This reply brief deals with certain arguments in the Brief in Opposition concerning (1) the importance under the circumstances of this case of the placement on the petitioner of the burden of proving prejudice resulting from his joint representation; and (2) the significance of the petitioner's counsel's failure to make timely motions for a mistrial and for a new trial.

1. The government concedes that the Circuits are in conflict regarding the proper placement of the burden of proof in joint representation cases. It does not dispute that the Eighth Circuit put the burden on the petitioner below even though he was not advised of the risks of joint representation by the trial court or his counsel. The Brief in Opposition claims, nonetheless, that this case is unworthy of this Court's consideration, asserting that the government "could and did bear any burden" of disproving prejudice to the petitioner. (Brief in Opposition, p. 8.) This assertion is flawed in several respects.

First, it rests on a flat misstatement of the nature of the conflict of interest between the petitioner and his co-defendant. The petitioner has not claimed, as the government suggests, that he had any affirmative interest in proving "aggravating circumstances" tending to inculpate his co-defendant. (Brief in Opposition, p. 7.) Rather, his interest was in stressing – through cross-examination, affirmative evidence and argument – circumstances tending to disprove elements of the offense of misapplication of bank funds. (See Petition at pp. 17-18.) Unfortunately, however, the petitioner's counsel could not stress these mitigating factors without also drawing the jury's attention to their inapplicability to the conduct of the petitioner's co-defendant. Separate counsel would not have labored under the same disadvantage.

Second, the government's assertion that it negated any likelihood of prejudice to the petitioner rests primarily on an analysis of the trial transcript. (Brief in Opposition, pp. 7-8.) However, as we pointed out in our Petition, at pp. 15-16, the record of a criminal trial will only rarely reflect the harm resulting from joint representation. The likelihood that the trial record may conceal prejudice to a

defendant is itself an important reason why the government should bear the burden of proof in this context.

Third, the government's position overlooks the indicia of prejudice which the record contains. Particularly striking, we submit, was the petitioner's counsel's suggestion during closing argument that the jury should not "compromise" its verdict by acquitting one co-defendant and convicting the other. See Petition, p. 18. In its Brief in Opposition, the government pointedly ignores this concrete evidence of prejudice to the petitioner.

In short, the government could not and did not sustain the burden of proving that the petitioner was not prejudiced by his counsel's effort to represent conflicting interests. Consequently, this case squarely presents the important question – over which the courts of appeals are still divided – of whether the defendant or the government should bear the burden of proof on the issues of conflict and prejudice arising out of joint representation when the defendant has not been warned of the risks of joint counsel and has not waived his Sixth Amendment rights.

2. The government relies on defense counsel's closing argument and the trial court's jury instructions in downplaying the significance of counsel's admitted failures to file timely motions for a mistrial and for a new trial. This reliance is misplaced.

Defense counsel's reference during closing argument to the dismissal of Count 1 is said to demonstrate that the failure to move for a mistrial was "tactical" or "intentional." (Brief in Opposition, pp. 9, 10.) But the issue is not whether the failure to move for a mistrial was intentional (as opposed to inadvertent), but whether it can be described as competent. In light of other aspects of

this attorney's performance in this case, we respectfully submit that no such conclusion can be drawn. Furthermore, the references by counsel during closing argument to the Count 1 evidence do not, as the government suggests, demonstrate that counsel saw a tactical advantage in foregoing a motion to sever. The jury had listened to 46 of the government's 53 witnesses testify solely about Count 1, and it was therefore obviously necessary that defense counsel deal with that evidence in some manner in his closing argument. The fact that counsel chose to tell the jury that this evidence should be viewed as favorable to his client did not make it so in the jury's mind.

According to the government, an instruction directing the jury to "disregard" the Count 1 evidence was sufficient to make it unlikely that prejudice resulted from the negligent failure to file a motion for a new trial. However, the court's instruction, twice repeated, was vague indeed. The jury was told only that it should "disregard all evidence received previously only insofar as that evidence deals with Count 1." This ambiguous phrasing left the jury free to consider the testimony of the government's 46 Count 1 witnesses in connection with the remaining counts, but did not explicitly limit its use to the narrow purposes permitted by the Federal Rules of Evidence. Such a charge was plainly insufficient to guard against prejudice. More to the point, however, the trial court was in the best position to determine the impact of the Count 1 evidence on the fairness of the petitioner's trial – and the adequacy of any curative instructions. Because petitioner's counsel failed to move for a mistrial or a new trial, the trial court never had the opportunity to make that determination. Counsel's failure to take necessary steps to protect his client from prejudice, we submit, deprived the petitioner of his Sixth Amendment rights.

Respectfully submitted,

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